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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. _____

JAMES OTHEL BORUFF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED:

Under *Rakas v. Illinois*, 439 U.S. 128 (1978), is it now the law that by merely placing legal title and vehicle registration in another's name, a citizen who has purchased, improved, possessed and monitored the vehicle searched is stripped of his legitimate expectation of privacy in that vehicle?

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JAMES OTHEL BORUFF,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner James Othel Boruff respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 31, 1990.

OPINIONS BELOW

The opinion of the court of appeals is reprinted in the appendix. See App. at 18a.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1990. A petition to rehear was denied on September 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment 4

This provision is set forth at App. 42a.

STATEMENT OF THE CASE

On November 22, 1985, the petitioner, James Othel Boruff, was driving north on Highway 358 approximately 30 miles south of Marathon, Texas. Boruff, in a white Lincoln Town Car, was driving approximately 300 yards in front of a silver Chevrolet pick up truck, which contained about 590 pounds of marijuana. Boruff and the driver of the truck, Russell Boyd Taylor, were in constant communication via a citizens band radio in an effort to avoid detection.

Just after 9:00 a.m., Boruff spotted a Border Patrol vehicle headed south on Highway 385. He reversed direction to see if the Border Patrol vehicle had detected them. As Boruff headed south, the Patrol vehicle, which had apparently reversed direction, passed him again headed north. Boruff again reversed direction and

attempted to divert the patrol car away from the truck.

Boruff did not succeed in his attempt. The pickup truck, and eventually the car, were stopped by border patrol agents. An unlawful search of the truck resulted in the seizure of the marijuana and the arrests of Boruff and Taylor.[1] On

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[1] The district court's conclusion that the search of the truck was unlawful was subsequently affirmed by the United States Court of Appeals for the Fifth Circuit. As stated by the Fifth Circuit:

> The district court concluded that the stop of Taylor's vehicle was not supported by reasonable suspicion because there was a paucity of objective, articulable facts to support such a finding. Speaking as an appellate court which reviews the cold records, we cannot say that the district court, familiar with the area where the stop took place and having had the benefit of hearing the witnesses first hand, erred in its determination that reasonable suspicion was lacking. *United States v. James Othel Boruff and Russell Boyd Taylor*, No. 86-1175 (April 27, 1987),
>
> (continued...)

December 13, 1985, Boruff and Taylor were charged in a two count superseding indictment with possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1), and conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. § 846.

Boruff and Taylor each filed motions to suppress the evidence seized from the truck and the car. The district court granted these motions on February 3, 1986. The United States appealed the suppression order to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the suppression order as to Taylor

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[1](...continued)
citing, *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) and *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) see also, (App. 11a-12a).

but reversed as to Boruff.[2] The Fifth Circuit concluded that,

> Boruff lacked standing to challenge the stop and search of Taylor's vehicle because the stop did not violate Boruff's own fourth amendment rights. Hence, the evidence obtained as a result of the stop of Taylor's vehicle was properly admissible against Boruff.[3]

The unpublished panel opinion reasoned that:

> Boruff provided no evidence to establish that the stop of Taylor's truck violated Boruff's fourth amendment rights. Taylor was the driver, sole occupant and registered owner of the pickup truck where the marijuana was found; Boruff had neither a proprietary nor a possessory interest in Taylor's truck.[4]

Following remand, the government dismissed the indictment against Taylor and proceeded with its case against Boruff.

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[2] See *United States v. James Othel Boruff and Russell Boyd Taylor*, No. 86-1175 (April 27, 1987); (App. at 14a).

[3] App. at 14a-15a.

[4] App. at 15a.

Boruff subsequently filed a motion with the district court requesting a hearing to establish his constitutional standing so as to contest the search of the truck driven by Taylor.

On August 5, 1987, the trial court held a hearing to resolve the question as to Boruff's standing. At this hearing Boruff testified to the following facts:

> (a) On July 9, 1985, Boruff contacted Mr. Kenneth Wayne Howell, a salesman from Jack Sherman Chevrolet in Midland, Texas. Boruff negotiated the purchase of a grey Chevrolet pickup truck with Howell and Boruff paid for the truck with his own funds. This was the same truck that was later seized by Border Patrol Agents on November 22, 1985.
>
> (b) At the dealership, Boruff inspected the truck and informed Mr. Howell that he would require undercoating and a heavy duty rear bumper on the truck. Mr. Boruff and Mr. Howell renegotiated the price to account for the extra cost of this bumper and Boruff made a $2,000 down payment. While the truck was being undercoated and having the new bumper

installed, Boruff obtained cashier's checks to pay the balance of the purchase price, with his own personal funds.

(c) Boruff instructed Howell to have the truck's title placed in the name of Russell Taylor so as to avoid suspicion in case the truck was stopped or involved in an accident while Taylor was driving.

(d) Boruff planned to eventually sell the truck and keep the proceeds from the sale.

(e) Within a day or two after Boruff purchased the truck, he drove it to Knoxville, Tennessee.

(f) In Knoxville, on July 15, 1985, Boruff took his truck to Copeland Corporation to purchase a black camper top for the truck. The black top was not available for several weeks, so Boruff had a white top installed in the interim. Both purchases were made by Boruff with his own personal funds. However, in keeping with his earlier plan to avoid suspicion, Boruff had the invoices made out using Russell Taylor's name. Later, when the white top was resold, the money was returned to Boruff.

(g) On July 16, 1985, Boruff purchased a combination grill and bumper guard from Knoxville Bumper Sales. The purchase was again

made with Boruff's funds, but using Taylor's name.

(h) The grill and bumper guard, along with fog lights, running lights, switches, and a CB radio, were installed by Tim's Auto Repair in Knoxville, Tennessee. The work was done by Tim Detienne.

(i) Boruff also purchased a tarpaulin and yellow nylon cord from Knox Farmer's Cooperative. This purchase was made in his own name and with his own money. These items were also seized from the Chevrolet pickup truck on November 22, 1985.

(j) The work to Mr. Boruff's truck was done with the understanding that if the truck was ever resold, the entire proceeds would be returned to Boruff.

(k) Russell Taylor's involvement with the truck up until this point had been minimal. Mr. Taylor was present when Boruff negotiated and paid for the truck. He was also present on one of the above trips to equip the truck. However, none of Taylor's funds were ever used to purchase or equip the truck.

In support of this testimony, Mr. Boruff offered invoices, receipts and cancelled checks documenting the above

transactions. To corroborate his testimony, Boruff called Kenneth Howell, Calvin Copeland and Timothy Detienne as witnesses to the above transactions at the standing hearing.

On September 11, 1987, the trial court denied Mr. Boruff's motion to establish standing to contest the search of the vehicle involved. On November 9, 1987, petitioner filed a motion requesting the district court to reconsider its ruling as to his standing. A second motion on this issue was filed on January 21, 1988. However, the district court again ruled, on March 9, 1988, that Mr. Boruff lacked standing to challenge the contested search.

Ultimately, the case of *United States of America v. James Othel Boruff*, P. 85-CR-33, was tried before the Honorable Lucius D. Bunton on June 27 and 28, 1989. On June 28, 1989, the jury found James

Boruff guilty of Counts 1 and 2 of the superseding indictment.

On September 11, 1989, the petitioner appealed his conviction to the United States Court of Appeals for the Fifth Circuit contesting the district court's ruling that he failed to establish a sufficient expectation of privacy in the truck to contest its unlawful search. The Fifth Circuit affirmed Boruff's convictions.[5] On August 28, 1990, Boruff filed a petition to rehear in the Fifth Circuit, but the petition was denied September 11, 1990.

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[5] *United States v. Boruff*, No. 89-1903 (5th Cir. July 31, 1990); (copy attached, app. at 18a).

REASON FOR GRANTING THE WRIT

UNDER *RAKAS V. ILLINOIS*, 439 U.S. 128 (1978), IT SHOULD NOT BE THE LAW, THAT BY MERELY PLACING LEGAL TITLE AND VEHICLE REGISTRATION IN ANOTHER'S NAME, A CITIZEN WHO HAS PURCHASED, IMPROVED, POSSESSED AND MONITORED THE VEHICLE SEARCHED IS STRIPPED OF HIS LEGITIMATE EXPECTATION OF PRIVACY IN THAT VEHICLE.

I. The Law of Standing -- Property Concepts Do Not Control

The sole inquiry for this Court is whether James Othel Boruff had a legitimate expectation of privacy in the Chevrolet pickup truck such that its unlawful search and seizure violated his own fourth amendment rights.

The concept of standing recognizes that a defendant may challenge a constitutional violation only if the violation "infringed an interest of the

defendant which the Fourth Amendment is designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). Accordingly, the burden is on the defendant to establish his standing by demonstrating that he has a legitimate expectation of privacy in the area searched. *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980); *Rakas v. Illinois*, 439 U.S. 128, 148-149 (1978).

Prior to *Rakas*, this Court had stated in *Jones v. United States*, 362 U.S. 257 (1960),[6] that standing could be established in one of two ways: first, "automatically" where the same possession needed to establish standing was also an essential element of the offense charged; or second, where one was legitimately on the premises where the search occurred or could

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[6] *Jones v. United States*, 362 U.S. 257 (1960), overruled in part, *United States v. Salvucci*, 448 U.S. 83, 95 (1980).

demonstrate an ownership or possessory interest in the property seized or area searched.[7]

Rakas later made clear that the off-cited talisman --" legitimately on the premises" -- would no longer be the test to evaluate whether an individual could claim the protections of the Fourth Amendment. The *Rakas* Court also "emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment." *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980) (quoting *Rakas*, 439 U.S. at 149-150, n. 17). Accordingly, the Court redefined the scope of interests protected by the fourth amendment. Drawing from the principle set forth in *Katz v. United States*, 389 U.S. 347, 352 (1967) that the

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[7] *Jones*, 362 U.S. at 264, 267.

fourth amendment is designed to protect people and not places, the *Rakas* Court held that in order for a person to claim the protection of the fourth amendment, that person must show a legitimate expectation of privacy in the invaded place.[8]

Since the seminal case of *Rakas v. Illinois*, various opinions of this Court, and of the federal circuit courts, have helped to define the boundaries and limits of the standing doctrine. In determining whether a person has standing to contest an unconstitutional search, a court must consider, generally, the totality of the

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[8] *Rakas*, 439 U.S. at 143; See also, *Rawlings v. Kentucky*, 448 U S. 98, 106 (1980) (defendant must establish standing by demonstrating a legitimate expectation of privacy in the area searched); *Smith v. Salvucci*, 448 U.S. 83, 91-93 (1980); *United States v. Collazo*, 732 F.2d 1200, 1204-05 (4th Cir. 1984); *United States v. Wiley*, 847 F.2d 480 (8th Cir. 1988); *United States v. Hastamorir*, 881 F.2d 1551 (11th Cir. 1989).

circumstances involved.[9] Factors that have been considered include: (1) whether a person has a property or ownership interest in the items seized or the area searched;[10] (2) whether a person has a possessory interest in the items seized or the area searched;[11] (3) Whether a person has a right to exclude other persons' access to the area searched;[12] (4) whether a person has exhibited a subjective expectation that the items seized or the area searched would

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[9] See e.g., *United States v. Torres*, 720 F.2d 1506, 1510 (11th Cir. 1983) (per curiam) (totality of circumstances must be examined in determining individual's right to challenge search or seizure); and *United States v. Melucci*, 888 F.2d 200 (1st Cir. 1989).

[10] *Rakas*, 439 U.S. at 143.

[11] See *United States v. Dotson*, 817 F.2d 1127 (5th Cir. 1987) and *United States v. Quinn*, 751 F.2d 980 (9th Cir. 1984).

[12] *Rakas v. Illinois*, 439 U.S. at 149; *Rawlings v. Kentucky*, 448 U.S. at 105.

remain free from governmental intrusion,[13] (5) whether a person has taken precautionary measures to maintain the right of privacy;[14] (6) whether a person has entered into an arrangement with another to jointly control and supervise an enterprise;[15] (7) whether a person is legitimately on the premises which

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[13] *Salvucci*, 448 U.S. at 93; See also, *United States v. Broadhurst*, 805 F.2d 849, 853 (9th Cir. 1986).

[14] See *Katz v. United States*, 389 U.S. 347, 352 (1967) (defendant who shut door of telephone booth to exclude others had legitimate expectation of privacy in booth); *United States v. Trickey*, 711 F.2d 56, 58 (6th Cir. 1983) (defendant as lessee had legitimate expectation of privacy in outbuilding on rented property where his boarded up windows indicated his desire not to expose activity to public view); see also, *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982).

[15] See *Perez*, 689 F.2d at 1338; *Quinn*, 751 F.2d at 981; and *United States v. Johns*, 707 F.2d 1093 (9th Cir. 1983), rev'd on other grounds, 469 U.S. 478 (1985).

are subject to the intrusion;[16] and (8) whether a person has abandoned the items seized or the area searched.[17]

Accordingly, the law of what must be shown by a citizen to claim the protection of the Fourth Amendment has

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[16] *Rakas v. Illinois*, 439 U.S. at 148. The *Rakas* Court held that this factor was not irrelevant but concluded it "cannot be deemed controlling." Id. Prior to this statement, the Court made clear that it was rejecting "blind adherence to a phrase [legitimately on the premises] which at most has superficial clarity and which conceals underneath that veneer all of the problems which must be faced in any conscientious effort to apply the Fourth Amendment." Id. at 147.

The Fifth Circuit panel below attached great significance to the fact that Boruff was not in the truck when it was stopped or searched (although he was watching its every movement) citing *Rakas* for the proposition that legitimate presence at time of the search an "important factor." App. at 33a-34a.

[17] See *Perez*, 689 F.2d at 1338; *United States v. Anderson*, 663 F.2d 934, 938 (9th Cir. 1981); and *United States v. Weber*, 668 F.2d 552, 558-59 (1st Cir. 1981) (no legitimate expectation of privacy in abandoned boat).

gradually moved away from technical distinctions and labels based on title or ownership, and towards an analysis based on the totality of circumstances which demonstrate that a particular person has a legitimate expectation of privacy in the items seized or the area searched.

In the instant case, James Boruff introduced sufficient evidence to show that he did in fact have a legitimate expectation of privacy in the Chevrolet pickup truck and that the unlawful search which ensued violated his fourth amendment rights; hence, both the district court and the United States Court of Appeals for the Fifth Circuit erred in ruling that Mr. Boruff did not have standing.

II. James Othel Boruff's Legitimate Expectation of Privacy.

The panel opinion of the Fifth Circuit rejected Boruff's claim of a

legitimate expectation of privacy, largely because the title, registration, and insurance for that truck were not in Boruff's name. App. at 33a. This approach clearly attaches excessive weight to the labels of legal title and legal ownership in the analysis of what constitutes a legitimate expectation of privacy in the area searched. The Fifth Circuit's approach is thus fundamentally inconsistent with the analytical guidelines developed in this Court's Fourth Amendment jurisprudence and reaffirmed in *Rakas*, which rejected labels designating property interests as controlling on this question.

The following paragraphs will illustrate how all of the various facts in this case cut in favor of a holding that Mr. Boruff had a legitimate expectation of privacy in the truck searched, without

impermissible focus on labels designating property interests.

A. Ownership Interest.

Ownership or possession of the items seized or the area searched are obvious factors to be considered when determining whether one has a legitimate expectation of privacy. While these factors do not control fourth amendment jurisprudence, this Court has recognized that expectations of privacy may be "legitimized" by "reference to concepts of real or personal property law or to understandings that are recognized and permitted by society," with the strength of each varying upon on the circumstances of each case.[18] Clearly, such concepts are still relevant to the analysis; but the labels designating those concepts and

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[18] *Rakas*, 439 U.S. at 143-44, n. 12.

various distinctions therein do not control the evaluation of a claim of fourth amendment protection. Hence, evidence produced in this case by Mr. Boruff demonstrated his legitimate ownership interest in the truck.

James Boruff negotiated for and purchased the truck. Boruff and Russell Taylor had an understanding that in the event the truck was resold, Boruff would receive the proceeds from such a sale. Boruff and Taylor also had an understanding that Boruff owned the truck. Kenneth Howell, a salesman at Jack Sherman Chevrolet, also understood that Boruff was the owner of the truck and that Taylor would merely be driving for him. Boruff also demonstrated that he purchased the equipment that was installed on the truck and had repair work done on the truck, both of which he paid for with his own money. Hence,

James Boruff demonstrated an ownership interest in the truck.[19]

Under *Rakas*, labels associated with the concepts of property law are no longer dispositive in this area; thus, the fact that the title and registration to the truck was actually in Russell Taylor's name does not control the issue of standing as to James Boruff. Hence, the evidence introduced by Mr. Boruff showed that he purchased and owned the truck such that he did in fact have a legitimate expectation of privacy in his property -- the truck.

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[19] See *United States v. Mulligan*, 488 F.2d 732 (9th Cir. 1973), cert. denied, 417 U.S. 930 (1974) (stating that the owners of an automobile, registered to a ficticious name and nonexistent address, could challenge the warrantless search of the automobile despite the fact that the automobile had been parked in another person's driveway for two months).

B. Possessory Interest

Clearly, another factor relevant to the issue of a legitimate expectation of privacy is a possessory interest. The record demonstrates that Mr. Boruff had just such a possessory interest.

Specifically, Boruff purchased the truck with his own money. After the purchase, Boruff kept sole possession of the truck which he then drove to Knoxville, Tennessee. In the span of three to four weeks that followed, James Boruff had several repairs done on the truck, and installed various types of equipment to the truck. Thereafter, Boruff loaned the truck to Russell Taylor who drove it in Texas.

Mr. Boruff's possessory interest may be illustrated by examining the case of *United States v. Dotson*, 817 F.2d 1127 (5th Cir. 1987). In *Dotson*, Owens was driving a car on loan which was, for all practical

purposes, owned by Dotson, although legal title was held by Dotson's sister. Owens was stopped by a police officer for exceeding the speed limit. The officer secured Owens' consent to search the car and found a quantity of marijuana and $90,000 in cash in a paper bag in the trunk. Both Owens and Dotson moved to suppress the evidence as fruits of an unreasonable search and seizure. Owens, however, admitted at the suppression hearing that he had no expectation of privacy in the car and, therefore, lacked standing.

Dotson's motion to suppress was denied by the district court, which held that he did not have standing because he was not the legal owner of the car.

The Fifth Circuit reversed, holding that Dotson did indeed have standing to challenge the search of the car. Focusing the inquiry on whether Dotson had

a reasonable expectation of privacy in the area searched, the court concluded that as legitimate possessor of the car for an extended period of time, Dotson had a "property or a possessory interest in the automobile" sufficient to constitute "an interest of the defendant which the fourth amendment was designed to protect."[20] The Fifth Circuit also reiterated the fact that while Dotson was not the legal owner of the car, this was not dispositive of the issue.[21]

In the present situation, James Boruff did not have legal title to the truck, yet, as in *Dotson*, he had possession of the truck for an extended period of time. Indeed, in that period of time, Boruff used his own funds to maintain and improve the

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[20] *Dotson*, 817 F.2d at 1135.

[21] Id.

truck. In reality, as all the circumstances indicate, it was Boruff's truck.

Likewise, Boruff was not in physical possession of the truck when the search took place; however, he certainly was maintaining control over the truck. He, like Dotson, loaned the truck to another for a particular purpose. Nonetheless, the possessory interest was still sufficient to denote a legitimate expectation of privacy in the truck, just as Dotson's was sufficient to denote an expectation of privacy in the car.

Significantly, *Dotson* found his legitimate expectation of privacy based solely on a possessory interest factor, while in the present case, Boruff has demonstrated not only a possessory interest but also an ownership interest and several other indicia of a legitimate expectation of privacy.

The record further demonstrates that Mr. Boruff monitored the truck's every move and exercised control over the vehicle through his communication with its driver- the man who was driving Boruff's vehicle for Boruff. This Court has found it significant to evaluate whether an individual claiming fourth amendment protection could legitimately exclude others' access to the item searched.

On this record, it would be impossible to conclude in light of Boruff's relationship to the truck, that he could not have excluded others from accessing it if he so chose. His ownership and possessory interest clearly gave him that right. Boruff's position is identical to Jones' friend in *Jones v. United States*, 362 U.S. 257 (1960). As this Court noted in *Rakas*, "[e]xcept with respect to his friend, Jones had complete dominion and control over the

apartment and could exclude others from it." 439 U.S. at 149. (Emphasis supplied). Here, except with respect to Boruff, Taylor had complete dominion and control over the truck.

Applying the logic of the Fifth Circuit in this case to Jones, Jones, to whom the apartment had been loaned, would have an expectation of privacy in the apartment; but, his friend, who had loaned the apartment to Jones, would not have such an expectation. This cannot and should not be the law.

C. Boruff's Subjective Expectation of Privacy and his Attempts to Safeguard His Privacy Interest.

The evidence demonstrated that James Boruff took precautionary measures to maintain and safeguard his privacy interest

in the truck.[22] He purchased and had installed a camper on the back of the truck for that very purpose. Additionally, Boruff outfitted the truck with two way radios so as to continually monitor the truck and his interest in it. This evidence makes it clear that Mr. Boruff had a subjective expectation of privacy in the truck and took steps to protect that interest. Similar actions have been viewed by many federal courts as relevant in the standing

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[22] See e.g., *Jones v. United States*, 362 U.S. 257 (1960) (apartment); *Katz v. United States*, 389 U.S. 347 (1967) (telephone and telephone booths); and *United States v. Trickey*, 711 F.2d 56, 58 (6th Cir. 1983) (lessee's boarded up windows indicated a legitimate expectation of privacy interest).

determination period,[23] and they warrant consideration in this case as well.

D. Joint Venture.

Another pertinent factor in considering the standing question is whether a person was acting in concert or jointly with another to control or supervise an enterprise pursuant to an agreement or other understanding. The instant case parallels *United States v. Perez*, 689 F.2d 1336 (9th Cir. 1982), where a car and a truck were traveling together in tandem in an attempt to smuggle heroin into United States from Mexico. Customs

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[23] See *Quinn*, 751 F.2d at 981 (noting the fact that to find the marijuana it was necessary to pump off the forward hold of the boat indicated reasonable precautions had been taken to preserve privacy); *Perez*, 689 F.2d at 1337-38 (noting that the right to exclude others is a factor to be considered in this analysis); c.f., *One 1987 Mercedes Benz*, 708 F.2d at 449 (noting that had the owner taken some precautions to safeguard her privacy interest in her loaned automobile, standing might have been established).

officials stopped and searched the truck. The district court denied the co-defendants driving the car standing to contest the search of the truck, holding that they had failed to demonstrate a legitimate expectation of privacy in the truck.

The Ninth Circuit Court of Appeals reversed. Noting the rule of *United States v. Reyes*, 595 F.2d 275, 278 (5th Cir. 1979), that a person may have a legitimate expectation of privacy in a place or object he does not own, the Ninth Circuit proceeded to hold that when the defendant had fashioned a formalized agreement to provide for the transportation of contraband in a pickup truck, and the defendant subsequently maintained close surveillance of that truck by having one ride in the truck with the driver and the other two follow closely behind in another vehicle, reasonable precautions to protect their privacy

interest had been taken. Thus, a legitimate expectation of privacy in the truck did exist.[24]

Perez is not constitutionally distinguishable from the instant case; yet the Fifth Circuit took an approach to the facts of this case in direct contradiction to the manner in which the Ninth Circuit addressed similar facts. This apparent conflict between two Circuit Court of Appeals gives this Court yet another reason to undertake review of these facts as they relate to fourth amendment jurisprudence.

This "joint venture" theory, combined with other factors such as taking reasonable precautions to protect one's

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[24] *Perez*, 689 F.2d at 1338.

privacy interest, has provided the rationale in several subsequent opinions.[25]

In the instant case, the Boruff-Taylor joint venture was combined with a myriad of other factors which demonstrated Boruff's legitimate expectation of privacy in the truck.

Specifically, Boruff and Taylor had a formalized arrangement to smuggle marijuana out of Southwest Texas. They had formulated a plan whereby they would travel in separate vehicles in an effort to maintain their privacy and possessory interest in the pickup truck. Boruff's sole purpose in monitoring the truck in a different vehicle was to prevent interference and intrusion upon the contents

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[25] See *United States v. Broadhurst*, 805 F.2d 849 (9th Cir. 1986); *United States v. Quinn*, 751 F.2d 980 (9th Cir. 1984); *United States v. Pollock*, 726 F.2d 1456 (9th Cir. 1984).

of the truck. Boruff also took affirmative steps to maintain his privacy interest in the truck by purchasing and having installed a camper on the back of the truck and by equipping the two vehicles with two way radios in an effort to maintain verbal communication in addition to the visual surveillance of the truck.

These specific precautions and safeguards taken by Boruff, combined with the joint venture, demonstrate a legitimate expectation of privacy.

E. Boruff's Absence of Abandonment

A final indicia of standing is the absence of an abandonment or relinquishment of one's privacy interest in an item seized or area searched. This too was a critical issue in the instant case. In affirming the denial of standing to Boruff, the Fifth Circuit stressed that Boruff relinquished any privacy interest he may have had, by

intentionally "disassociating himself" from the pickup truck.[26] With great deference to the Fifth Circuit, the evidence demonstrated quite the contrary.

As stated earlier, the evidence adduced at the standing hearing clearly shows that Boruff took several affirmative

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[26] In reaching this conclusion, the Fifth Circuit relied largely on two sets of factors. First, the court stressed that legal title and vehicle registration of the truck were placed in Taylor's name. As stated earlier, however, the purpose of *Rakas* was to eliminate "arcane distinctions" based on property law or legal title. *Rakas*, 439 U.S. at 148. Hence, the fact that title to the truck was in Taylor's name is not dispositive of this issue. Moreover, the several other indicia of standing established by Mr. Boruff demonstrated his legitimate expectation of privacy in the truck and the fact that he did not "disassociate himself." (App. at 35a).

Second, the Court stressed that Boruff's conduct after the Border Patrol was spotted indicates abandonment of his privacy interest. As discussed, infra, the evidence revealed quite the contrary. (App. at 33a).

acts to maintain and safeguard his privacy interest in the truck, following its purchase. The appropriate inquiry for abandonment is primarily a question of intent, and the intent may be inferred from words, acts, and other objective facts.[27]

Boruff's actions upon spotting the border patrol demonstrate that he further acted to safeguard his privacy interest in the truck. Boruff testified that he turned around to follow the patrol vehicle that was headed south to see if it was going to detect the pickup truck. Boruff also stated that he communicated this fact to Russell Taylor on the CB radio. Mr. Boruff then testified that he followed the border patrol southward until he observed that it had turned around and was heading north in the

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[27] See *United States v. Colbert*, 474 F.2d 174 (5th Cir. 1973); and *United States v. Anderson*, 653 F.2d 934 (9th Cir. 1981).

direction of the truck. At that point, Boruff also turned around to head north at the first available opportunity in an attempt to do something to protect the contraband in the pickup truck.

Hence, this case closely parallels the situation in *Perez* where the Court found no abandonment on a similar set of facts, because the defendant exercised control over the enterprise and took reasonable precautions to protect his privacy interest.[28]

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[28] *Perez*, 689 F.2d at 1338. See also, *United States v. Mulligan*, 488 F.2d 732 (9th Cir. 1973), cert. denied, 417 U.S. 930 (1974) (holding that leaving automobile in another driveway for two months did not constitute abandonment); c.f. *United States v. Mendia*, 731 F.2d 1412 (9th Cir. 1984) (holding that turning over contraband to another while making no effort to follow that person or exert some degree of control over his conduct constituted abandonment); *United States v. One 1977 Mercedes Benz*, 708 F.2d 444 (9th Cir. 1983) (noting that voluntary loan of automobile to another for the other's exclusive use and not taking any precautions to safeguard privacy, constitute

(continued...)

Accordingly, none of James Boruff's actions either before or after the Border Patrol was spotted support a conclusion that he intended to disassociate himself from his interest in the truck. To the contrary, all of Mr. Boruff's actions were calculated at preserving his legitimate expectation of privacy.

III. Conclusion

The Fifth Circuit opinion in this case is inconsistent with the command of *Rakas* to abandon labels identifying property interests as controlling the question of whether an individual has a legitimate expectation of privacy in the item or area searched. The Fifth Circuit's opinion also illustrates a conflict in the Circuits this Court should resolve.

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[28](...continued)
a relinquishment of the owner's expectations of privacy in the automobile).

James Othel Boruff established that he had a legitimate expectation of privacy in the Chevrolet pickup truck and that his fourth amendment rights were violated.

For all the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-1175

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JAMES OTHEL BORUFF, and
RUSSELL BOYD TAYLOR

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(P 85 CR 73)

(April 27, 1987)

Before BROWN, REAVLEY and JOLLY, Circuit Judges. E. GRADY JOLLY, Circuit Judge:[1]

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and

The government appeals from the district court's order suppressing evidence against the defendants James Boruff and Russell Taylor. Because we agree with the district court's finding that the border patrol agent's stop of Taylor's vehicle was illegal, we affirm the district court's ruling that evidence obtained as a result of this stop may not be used against Taylor. Since we find, however, that Boruff lacked standing to challenge the stop of Taylor's vehicle, we reverse the district court's suppression order as it pertains to Boruff.

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burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Shortly after noon on Thursday, November 21, 1985, U.S. Border Patrol Agent Donald Newberry observed a white Lincoln Continental, followed by a grey and black pickup truck with a camper cap, heading south on Highway 385 toward the Big Bend National Park. No other traffic was close to the two vehicles, which were travelling within the speed limit and were then approximately eleven miles south of Marathon, Texas. Both bore Texas license plates, although Newberry did not recognize the two unaccompanied drivers as "locals." Because the national park attracts a large number of tourists annually, it was not unusual for Newberry to see such vehicles on Highway 385, one of two main entrance roads to the park. Newberry noted the vehicles, however, because, being driven in tandem with only the driver in each, they fit a

"smuggler pattern" in which one vehicle is dropped off over the Mexican border so that it can be returned carrying contraband or aliens, and he knew that much illegal activity occurs on Highway 385. He also noted that the Lincoln carried a magnetic CB antenna on its roof and that he had an unobstructed view through the pickup camper's windows.

Just after 9 a.m. the next day, Newberry and his partner noticed the same two vehicles, separated by a tour bus, heading northbound on Highway 385, approximately thirty miles south of Marathon. The driver of the Lincoln "pick[ed] up something and put it to his mouth as though it was a microphone" while looking at Newberry. Newberry and his partner turned to follow the vehicles north. The Lincoln, however, apparently had also turned and passed them heading southbound.

Because he had seen the vehicles heading into the park only the afternoon before, Newberry concluded that there had been too short a time for the drivers to have been camping there, and he radioed another agent, Harris Clanton, to intercept the Lincoln while he pursued the pickup truck.

As Newberry closed in on the truck, he observed that camping equipment was visible through the camper windows. Suspecting that a false compartment concealing aliens or contraband might be propping up the equipment, he signalled the driver of the pickup, Taylor, to pull over. The stop took place sixty road miles from the Mexican border. Taylor told Newberry that he had been camping and rafting in the park during the previous four days. To Newberry, this conflicted with his observation of Taylor's being on the highway the day before, but he conceded on cross-

examination that it was possible for a camper to have made a day trip that could cover the stretch of highway on which he had originally observed Taylor.

Taylor consented to Newberry's request to look inside the camper, and opened the truck's tailgate and camper top for the agents. At that point, Newberry was called back to his vehicle to answer a radio message from Clanton who informed him that the Lincoln had again turned around and was then heading north toward Newberry. Newberry returned to the pickup and Taylor reopened the camper when he returned. Camping equipment was resting on top of a large mound covered by a blue tarpaulin, and Newberry noticed a strong cherry scent not common to campers. Toward the rear of the truck bed were gas cans behind which large bundles of marijuana wrapped in clear plastic were visible. The agents ultimately

seized from the truck twenty-seven bundles of marijuana weighing 591 pounds.

Newberry placed Taylor under arrest. A few seconds later, the Lincoln approached and Newberry motioned the driver, Boruff, to stop. Newberry recognized Boruff as the same person he had seen the day before driving in tandem with the pickup, and noticed a little earlier driving ahead of the tour bus. Newberry noticed that the CB antenna was no longer on top of the Lincoln but was in plain view on the back seat of the car. Convinced that Boruff was travelling with Taylor, Newberry placed Boruff under arrest.

II.

Taylor and Boruff were indicted for possession of marijuana with intent to distribute and for conspiracy to possess marijuana with intent to distribute. Both defendants filed pretrial motions to suppress the evidence obtained as a result of the stop of Taylor's pickup truck. The district court ruled that the stop was illegal and that the evidence obtained as a result of the stop was inadmissible at trial. The government filed a motion for reconsideration, which was denied. This appeal followed.

III.

At issue in this case is the legality of the investigatory stop made on the pickup truck driven by Taylor.

Stops of vehicles by law enforcement authorities are governed by the Fourth Amendment which prohibits unreasonable searches and seizures. Generally, the Fourth Amendment requires that searches or seizures be conducted in accordance with a warrant supported by probable cause. Searches and seizures made at or near the border, however, for largely historical reasons need not conform to the warrant and probable-cause requirements. In particular, the Supreme Court has held that roving border patrols may stop vehicles near the border if the detaining officers have a reasonable suspicion that individuals topped were violating federal law. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981);

United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

Reasonable suspicion for making an investigatory stop near the border exists if there are "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion: that the stopped vehicle contained illegal cargo. *Cortez*, 449 U.S. at 416 (quoting *Brignoni-Ponce*, 422 U.S. at 884); *United States v. Henke*, 775 F.2d 641, 643 (5th Cir. 1985). (Although this standard was originated in the context of smuggling illegal aliens, neither party disputes its applicability to the smuggling of drugs over the border). The determination of reasonable suspicion must be made on the totality of the circumstances, *Henke*, 775

F.2d at 643,[2] and the officer making the stop is "entitled to assess the facts in the light of his experience in detecting illegal entry and smuggling." Id. at 885; *United States v. Pallares-Pallares*, 784 F.2d 1231, 1233 (5th Cir. 1986).

The district court concluded that the stop of Taylor's vehicle was not supported by reasonable suspicion because there was a paucity of objective, articulable facts to support such a finding.

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[2] The courts have mentioned a number of factors to be considered (although no single one is controlling);

> (1) characteristics of the area in which the vehicle is encountered; (2) proximity to the border; (3) usual patterns of traffic on the particular road; (4) previous experience with alien traffic; (5) information about recent illegal crossing in the area; (6) behavior of the driver, as erratic driving or obvious attempts to evade officers; (7) appearance and aspects of the vehicle; and (8) number, appearance, and behavior of passengers.

Brignoni-Ponce, 422 U.S. at 884-85.

Speaking as an appellate court which reviews the cold records, we cannot say that the district court, familiar with the area where the stop took place and having had the benefit of hearing the witnesses first hand, erred in its determination that reasonable suspicion was lacking.[3]

The district court found that the border patrol agents had only a slim basis for reasonable suspicion based on objective, articulable facts: the same vehicles were

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[3] Although particular findings of fact by a district court in suppression proceedings are subject to the "clearly erroneous" standard, a district court's ultimate finding as to whether the facts give rise to reasonable suspicion has been subject to different standards of review in this circuit. In some cases, the court has applied the "clearly erroneous" standard to the district court's determination of reasonable suspicion. See *Henke*, 775 F.2d at 664 n. 6, while in other cases, the court has exercised an independent review. Id. We need not decide which standard to apply here since our conclusion would be the same regardless of the standard applied.

travelling in tandem on two consecutive days, camping equipment not observed the previous day was seen piled high in the rear of the truck driven by Taylor, and the Lincoln apparently made a quick U-turn on the second day that the two vehicles were observed. These facts, while perhaps somewhat unusual, were certainly not, in the view of the district court, highly suspicious. Moreover, the district court found that the behavior of the defendants upon being observed by border patrol agents, as well as the appearance of the vehicles could only be characterized as normal. In short, the district court concluded that the observations upon which Agent Newberry based his stop were readily consistent with innocent activity. We find no compelling reason to conclude otherwise.

IV.

The district court determined that the evidence obtained as a result of the invalid stop of Taylor's vehicle could not be used against either defendant. Evidence may not be excluded against a defendant under the Fourth Amendment, however, unless it is established by the defendant that the unlawful search or seizure violated his own constitutional rights. *United States v. Payner*, 447 U.S. 727, 731 (1980) (emphasis added). A defendant's Fourth Amendment rights are violated only when the challenged conduct invades his legitimate expectation of privacy rather than that of a third party. Id. Contrary to the district court's ruling, Boruff lacking standing to challenge the stop and search of Taylor's vehicle because the stop did not violate Boruff's own Fourth Amendment rights. Hence, the evidence obtained as a result of

the stop of Taylor's vehicle is properly admissible against Boruff.

Boruff produced no evidence to establish that the stop of Taylor's truck violated Boruff's Fourth Amendment rights. Taylor was the driver, sole occupant and registered owner of the pickup truck where the marijuana was found; Boruff had neither a proprietary nor a possessory interest in Taylor's truck. Furthermore, the fact that Boruff claims a possessory interest in the marijuana found in Taylor's truck does not give him standing to contest the stop of the truck, since the ownership of drugs found in another's property does not create the legitimate expectation of privacy necessary to support a Fourth Amendment claim. *Rawlings v. Kentucky*, 448 U.S. 98, 105-06 (1980).

V.

Boruff argues that the government waived its right to challenge his standing to contest the stop of Taylor's truck. We disagree. Prior to the district court's ruling on the defendants' suppression motion, the government filed a supplemental challenge to Boruff's standing to contest the search of Taylor's truck. The district court apparently considered this contention because it stated in its memorandum order granting the motion to suppress: "[T]he court has considered the government's objection to the defendants' standing to raise complaints about the alleged illegal stop and finds same to be without merit." Hence, contrary to the assertions of Boruff, the government's objection to his standing was raised before, and considered by, the district court. The cases cited by Boruff

in support of his argument[4] are readily distinguishable, since, unlike this case, they involved instances where the government raised the standing issue for the first time on appeal.

VI

For the reasons discussed earlier, the district court's suppression order is affirmed with respect to Taylor but reversed with respect to Boruff. The case is remanded for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[4] Boruff cites *Steagald v. United States*, 451 U.S. 204 (1981); *United States v. Settegast*, 755 F.2d 1117 (5th Cir. 1985); *United States v. Mendoza*, 722 F.2d 96 (5th Cir. 1983); and *United States v. Sanchez*, 689 F.2d 508 (5th Cir. 1982).

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-1903

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JAMES OTHEL BORUFF,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(P 85 CR 73)

(July 31, 1990)

Before CLARK, Chief Judge, JOLLY and JONES, Circuit Judges:

CLARK, Chief Judge:

I. Introduction.

James O. Boruff (Boruff) appeals his conviction on conspiracy to possess and possession of more than 50 kilograms of marijuana with intent to distribute. 21 U.S.C. §§ 841(a)(1), 846. We affirm.

II. Facts.

A. Background.

Boruff purchased a new Chevrolet pickup truck to use in smuggling marijuana from the Mexican border into Texas. Russell B. Taylor (Taylor), a co-conspirator, accompanied Boruff to make the purchase. Boruff selected a heavy-duty bumper to install on the truck and gave the salesman $2,000 as a down payment. Boruff later bought two cashiers checks bearing Taylor's name to pay the balance of the purchase price. Boruff instructed the salesman to put the title in Taylor's name. Boruff and Taylor had agreed that appearances would be

best served by putting Taylor's name on all documents relating to the truck, since Taylor would be driving the truck for the smuggling operation.

Boruff and Taylor flew to Dallas, Texas to obtain automobile insurance for the truck and a Texas driver's license for Taylor. The truck's registration and insurance were placed in Taylor's name. Boruff later purchased a camper top for the truck, listing Taylor's name on the invoice. Boruff also installed a grill and bumper guard, a CB radio, and fog lights on the truck. Boruff and Taylor understood that if the truck was ever sold, Boruff would receive the money.

Boruff arranged to have his girlfriend, Brenda Lawless (Lawless), rent a car for him, which he planned to use in the smuggling operation. Lawless rented a white Lincoln Towncar in her own name and

turned it over to Boruff. The standard rental agreement signed by Lawless provided that only she would drive the car and that the car would not be used for any illegal purpose. Boruff was aware of these restrictions when he took possession of the vehicle. Boruff placed a CB radio in the glove compartment of the car and a magnetic antenna on its roof.

B. The Smuggling Operation

Taylor and Boruff traveled toward the Mexican border on Highway 385 south of Midland, Texas. Taylor drove the pickup truck, and Boruff drove the rental car. The two maintained contact by CB radio. At one point, Border Patrol Agent Newberry (Newberry) noticed the two vehicles traveling approximately 100 yards apart on the highway. He observed that the two vehicles were traveling at the same speed, bore Texas license plates, and contained no

one else but the drivers. His view through the windows of the camper top was unobstructed. Although his suspicions were not then aroused, Newberry made a mental note of the vehicles because they fit a "smuggler" pattern common to the area.

Taylor and Boruff subsequently left the truck unattended on the United States' side of the Rio Grande river. When they returned, the truck had been loaded with marijuana as Boruff had arranged. Boruff and Taylor covered the marijuana with a tarpaulin and placed camping gear on top of it.

The next morning, Taylor and Boruff traveled northbound on Highway 385. The two vehicles passed Agent Newberry, who was traveling southbound in a Border Patrol vehicle. As Boruff passed, Newberry observed him put something to his mouth "as though it was a microphone" and noticed the

CB antenna on top of Boruff's car. Newberry also saw that the same truck he had seen the previous day was trailing Boruff, separated only by a tour bus. Newberry decided to make a U-turn and follow the vehicles.

After spotting the Border Patrol vehicle, Boruff made a U-turn southbound to see whether the Border Patrol vehicle would pursue them. Boruff passed the Border Patrol vehicle, which was now traveling northbound in pursuit of the pickup truck. Agent Newberry, fearing that Boruff would get away, contacted another Border Patrol agent, Harris Clanton (Clanton) and instructed him to stop Boruff's car. Boruff made a second U-turn and traveled northbound, hoping to catch up to the Border Patrol vehicle an divert attention away from the pickup truck.

C. The Searches, Seizures, and Arrests.

Agent Newberry pulled up behind the pickup truck and noticed the camping gear riding high in the camper. Newberry pulled along side of the truck and signalled Taylor to stop. Newberry approached the truck and asked Taylor if he would mind opening the camper top. Taylor complied, exposing the camping gear. Newberry opened the truck's tailgate and discovered 591 pounds of marijuana. Taylor was placed under arrest.

In the meantime, Agent Clanton had been pursuing Boruff but had not yet stopped him. As Boruff approached the point where the pickup truck was stopped, he saw Agent Newberry standing in the road motioning for him to stop. Newberry noticed that the CB antenna was no longer on the roof of Boruff's car but was in plain view in the back seat. After Boruff stopped, he was

placed under arrest and read his *Miranda* rights. The agents subsequently found in the car a walkie-talkie radio identical to one recovered from the pickup truck, a CB radio, the CB radio antenna, $4,700 in United States currency, and some of Boruff's personal effects.

As Agent Clanton drove Boruff to the Border Patrol station, Boruff denied having any knowledge of Taylor, the truck, or its contents. Clanton allowed Boruff to place a call to his attorney, who was out of the office. The attorney called back fifteen minutes later. Boruff proceeded to describe the events leading up to his arrest, in front of Clanton. Clanton later testified at trial that during the first half of the telephone conversation Boruff used "we" and "us" in describing the day's events, while halfway through the

conversation Boruff began to use the singular "I."

D. Prior Proceedings.

Boruff and Taylor were indicted for conspiracy to possess and possession of more than 50 kilograms of marijuana with intent to distribute. 21 U.S.C. §§ 841(a)(1), 846. They moved to suppress the evidence on the grounds that the search of the pickup truck and the rental car took place without warrant or reasonable suspicion in violation of the fourth amendment. The district court held a suppression hearing, which consisted almost entirely of Agent Newberry's testimony concerning the searches and seizures. After the hearing was over, the government filed a belated answer to the defendants' suppression motion, challenging Boruff's fourth amendment standing to contest the search of the pickup truck and the rental

car. The district court concluded that the agents had no reasonable suspicion to stop or search the vehicles and granted the defendants' motion to suppress.

On appeal, this court affirmed the suppression order as to Taylor but reversed and remanded as to Boruff. The court concluded that Boruff had no standing to contest the search of the pickup truck because "Boruff had neither a proprietary nor a possessory interest in Taylor's truck." *United States v. Boruff*, No. 86-1175, slip op. at 9 (5th Cir. Apr. 27, 1987) [818 F.2d 863 (Table)]. The court did not rule on Boruff's standing to challenge the search of the rental car.

E. The Present Proceedings.

Boruff subsequently filed a motion to establish standing in the pickup truck and the rental car. He explained that he had not presented any evidence to establish standing because the government had not given notice prior to the suppression hearing that it would make standing an issue. The district court held an evidentiary hearing, and Boruff presented evidence concerning his interest in the pickup truck.

The district court denied Boruff's motion to suppress, concluding that he had no legitimate expectation of privacy in the pickup truck or the rental car and therefore had not standing to challenge the searches. Boruff was tried by jury and convicted on both counts of the indictment. The district court sentenced Boruff to ten years'

imprisonment, a three year term of special parole, and $100 in special assessments.

Boruff now appeals, contending that the district court erred in denying his standing to challenge the search of the truck and the rental car. He also argues that he should not have been tried on the superseding indictment, that the district court erroneously conditioned the giving of a requested jury instruction on a waiver of his right to remain silent, and that the court erred in allowing Agent Clanton to testify concerning Boruff's conversation with his attorney. We affirm.

III. Analysis.

A. Standing.

The district court may not suppress evidence under the fourth amendment unless the defendant establishes that an unlawful search or seizure violated his own constitutional rights. *United States v.*

Payner, 447 U.S. 727, 731 100 S.Ct. 2439, 2443, 65 L.Ed.2d 468 (1980). "[T]he defendant's Fourth Amendment rights are violated only when the challenged conduct invaded his legitimate expectation of privacy rather than that of a third party." *Id.* (Emphasis in original). The fourth amendment does not protect merely subjective expectations of privacy but only those "expectation[s] that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967).

1. The pickup truck

Boruff argues that he had a legitimate expectation of privacy in the pickup truck because (1) he was the equitable owner of the truck and had a possessory interest in it, (2) he exercised joint control over the truck during the smuggling operation, and (3) he had a

subjective expectation of privacy in the truck and took precautionary measures to safeguard that privacy. He contends that Taylor's legal title to the truck did not negate this legitimate expectation of privacy because property law concepts are not controlling on the standing issue.

In response, the government denies that Boruff had a legitimate expectation of privacy in the pickup truck. It argues that Boruff's ownership and possessory interests were tenuous at best and that Boruff completely disassociated himself from the truck. The government also contends that we are bound under the law of the case by our prior holding that Boruff has no standing to challenge the search of the truck.

The law of the case does not control our decision on this issue because the evidence presented by Boruff's standing hearing was "substantially different" from

that adduced at the prior suppression hearing. *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967). Our previous holding was based on a lack of evidence in the record that Boruff had any interest in "Taylor's truck." *Boruff*, No. 86-1175, slip op. at 9. Boruff subsequently presented evidence of his interest. The only reason Boruff had not presented this evidence before was because the government did not challenge his standing until after the suppression hearing was over. Under these circumstances, Boruff was entitled to present evidence of his standing. See *White*, 377 F.2d at 432.

We conclude nevertheless that Boruff failed to establish that he had a legitimate expectation of privacy in the pickup truck. Despite his asserted ownership interest, Boruff did everything he could do to disassociate himself from the truck in the event it was stopped by law

enforcement officials. He placed the title, insurance, and registration in Taylor's name, paid for the truck with cashiers checks purchased in Taylor's name, and bought the camper top using Taylor's name. During the smuggling operation, Taylor, not Boruff, drove the truck. Boruff traveled in a separate vehicle and maintained a safe distance from the truck, allowed other vehicles between his vehicle and the truck, and left his position out in front of the truck after spotting the Border Patrol vehicle. As the district court concluded, these actions "clearly show[ed] Boruff's intention to leave any 'expectation of privacy' to Taylor."

In addition, Boruff was not present when the truck was stopped or searched. See *Rakas v. Illinois*, 439 U.S. 128, 148, 99 S.Ct. 421, 433, 58 L.Ed.2d 387 (1978) (legitimate presence at time of

search an important factor). He had left his position out in front of the truck to pursue the Border Patrol vehicle. He could not have been in radio contact with Taylor while the latter was outside with an officer as the truck was being searched. We therefore discount Boruff's assertion that he had joint control of the truck at the time of the stop and search. Boruff also disavowed any knowledge of the truck and its contents after his own vehicle was stopped.

Our decision in *United States v. Dotson*, 817 F.2d 1127 (5th Cir.), *modified*, 821 F.2d 1034 (5th Cir. 1987), is distinguishable. In *Dotson*, the defendant loaned his car to a friend, Owens for a brief time so that Owens could wash the car. Title to the car was in the name of Dotson's sister, although the car "for all practical purposes" belonged to him. Law enforcement officials stopped Owens for speeding and

asked it they could search the trunk. The search uncovered evidence of drug activity that was used to prosecute Dotson. We held that Dotson has standing to challenge the search because, "[g]iven the limited nature of the bailment of the car to Owens, . . . Dotson did not give up his expectation of privacy in the car by his temporary loan of a the vehicle." Id. at 1138.

In this case, Boruff did much more than loan the truck to a friend for a brief period of time. He completely disassociated himself from the truck both legally and factually for the express purpose of avoiding detection. Even ignoring the admitted illegal purposes for this arrangement, Boruff's asserted expectation of privacy in the truck is not one "that society is prepared to recognize as reasonable." *Katz*, 389 U.S. at 361, 88 S.Ct. at 516. An individual cannot

reasonably expect to maintain privacy in a vehicle when he or she has rendered all of the normal incidents of ownership, including title and possession, to another and disavows any knowledge of or interest in it. We conclude that Boruff has no standing to challenge the search of the pickup truck.

2. The rental car.

Boruff maintains that he had a legitimate expectation of privacy in the rental car because he was in sole possession and control of the vehicle at the time of the stop. He also argues that regardless of whether he had a legitimate expectation of privacy in the vehicle, the search was the fruit of an illegal stop or "seizure" of his person and should therefore be suppressed. He claims the district court found that the agents did not have reasonable suspicion to justify the stop. We reject these contentions.

Boruff had no legitimate expectation of privacy in the rental car. Under the express terms of the rental agreement, Lawless was the only legal operator of the vehicle. Lawless had no authority to give control of the car to Boruff. The rental agreement also expressly forbade any use of the vehicle for illegal purposes. Boruff was well aware of these restrictions when he took possession of the car and used it during the smuggling operation. He therefore had no legitimate expectation of privacy in it. See *United States v. Oregon*, 573 F.Supp. 876, 879-80 (D.N.M. 1983), *aff'd on other grounds*, 748 F.2d 1371 (10th Cir. 1984).

Nor was Boruff's stop illegal. Roving border patrols may stop vehicles near the border if the agents have reasonable suspicion that the vehicles contain contraband or illegal aliens. *United States*

v. Cortez, 449 U.S. 411, 417-18, 101 S.Ct. 690, 694-95, 66 L.Ed.2d 621 (1981). Reasonable suspicion exists if the agents "are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that illegal activity is afoot. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884, 95 S.Ct. 2574, 2581, 45 L.Ed.2d 607 (1975). The existence of reasonable suspicion depends on the facts known to the agent at the time the stop is made, not at the moment the agent decides to make the stop. See *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964); *United States v. Tinkle*, 655 F.2d 617, 623 (5th Cir. 1981), cert denied, 455 U.S. 924, 102 S.Ct. 1285, 71 L.Ed.2d 467 (1982).

At the time he stopped Boruff, Agent Newberry was aware of specific articulable facts which more than reasonably

warranted suspicion that Boruff was involved in drug smuggling. Newberry had observed Boruff and Taylor traveling at the same speed, in the same two vehicles, at approximately the same distance apart, on two consecutive days on the same stretch of highway near the Mexican border. He knew that Boruff had put something up to his mouth as if it were a microphone when the Border Patrol vehicle passed, that the rental car had a magnetic CB radio antenna on the roof, that Boruff made several U-turns after spotting the Border Patrol vehicle, and that the CB antenna was no longer on the roof of the car when Newberry motioned for Boruff to stop. Most importantly, Newberry had discovered the 591 pounds of marijuana in the pickup truck. In view of these facts, Newberry's suspicion rose to the level of probable cause. See *Illinois v. Gates*, 462 U.S. 213, 238-39, 103

S.Ct. 2317, 2332-33, 76 L.Ed.2d 527 (1983). The search of the rental car was therefore not the fruit of an illegal stop.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-1903

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES OTHEL BORUFF,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(September 11, 1990)

Before CLARK, Chief Judge, and JOLLY and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

AMENDMENT IV

The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.